

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant/Cross-Appellee,

v

MICHAEL PALADINO,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED

February 6, 1998

No. 195497

Oakland Circuit Court

LC No. 87-082563-FC

Before: Sawyer, P.J., and Wahls and Reilly, JJ.

PER CURIAM.

The prosecution appeals as of right the trial court's order granting defendant's motion to dismiss the charges of one count of possession with intent to deliver 650 grams or more of cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i), and one count of possession with intent to deliver marijuana, MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c), based upon double jeopardy grounds due to his conviction on conspiracy charges arising out of another case. Defendant cross appeals the trial court's denial of his motion for vindictive prosecution. We affirm in part and reverse in part.

In June 1987, pursuant to a federally issued search warrant, defendant's apartment was searched and more than 650 grams of cocaine, marijuana, drug paraphernalia, and over \$17,000 were seized. Defendant was initially arrested and arraigned in federal court, but the charges were dismissed and the matter was referred to the Oakland County prosecutor's office. Defendant brought a motion to dismiss the charges. Prior to the pre-trial hearing, defendant fled the jurisdiction, but was eventually returned to the state. Another motion to dismiss the charges was filed by defendant, as well as a motion to suppress the evidence obtained as a result of an invalid federal search warrant. The motion to suppress was granted, thus disposing of the case. The prosecution appealed as of right and this Court reversed and remanded to the trial court. *People v Paladino*, 204 Mich App 505; 516 NW2d 113 (1994). The Michigan Supreme Court denied defendant's application for leave to appeal. *People v Paladino*, 448 Mich 852; 528 NW2d 730 (1995).

Prior to the trial court acting on this Court's remand order, defendant was charged by the Southeast Michigan Conspiracy Organization (SEMCO) and pleaded guilty to conspiracy to possess

with intent to deliver between 50 and 225 grams of cocaine. Pursuant to the plea agreement, defense counsel brought a motion to amend the information to revert back a year so that it included the dates April 1987 to January 1992, rather than April 1988 to January 1992. This was granted without objection from the special prosecutor.

Defendant then brought a motion to dismiss the charges in the case at bar based on double jeopardy grounds due to his conviction on the conspiracy charges. Applying the same transaction test criteria that applies when both crimes are not specific intent crimes, the trial court concluded that the successive prosecution of the charges violated Michigan's protections against double jeopardy and granted defendant's motion.¹

On appeal, the prosecution argues that the trial court erred by dismissing the charges against defendant since his right against double jeopardy was not violated. We agree.

We review de novo double jeopardy issues. *People v Price*, 214 Mich App 538, 542; 543 NW2d 49 (1995). The Double Jeopardy Clauses of both the United States and Michigan Constitutions protect against a second prosecution for the same offense after acquittal or conviction and against multiple punishments for the same offense. *People v Jackson*, 153 Mich App 38, 41; 394 NW2d 480 (1986). The "same transaction" test has been adopted to be applied in analyzing claims of double jeopardy.

Where criminal intent is required in the offenses involved, the criterion set forth in [*People v White*, 390 Mich 245; 212 NW2d 222 (1973)] applies: "continuous time sequence and display [of] a single intent and goal." [*Jackson, supra* at 45-46.]

Because both prosecutions involved specific intent crimes, resolution of the double jeopardy issue depends on whether the crimes were committed in a continuous time sequence and displayed a single intent and goal. *White, supra*; *People v Jackson*, 153 Mich App 38, 45-46; 394 NW2d 480 (1986). We find that there was a continuous time sequence between the crimes because the date on the information from the SEMCO. case covers the date of the offense in the case at bar and there was no objection by the special prosecutor when defense counsel requested to amend the information to include that date. As well, the record shows that there was a single goal of possessing the cocaine with an intent to deliver it to others.

However, the trial court failed to consider defendant's plea in regard to the conspiracy charges. At the plea bargain hearing, defense counsel explained to the court that the charges in the present case at bar were pending. He then asked defendant if he understood that the plea agreement had nothing to do with the charges in the pending case, which is the case at bar in the present appeal. An exception to the same transaction test applies when defendant has pleaded guilty to one or more of the charges with an awareness that the prosecutor plans to proceed to trial on the other charges or offenses. *People v Plato*, 114 Mich App 126, 133-134; 318 NW2d 486 (1981); *People v Meeks*, 92 Mich App 433, 442; 285 NW2d 318 (1979). Under such circumstances, defendant waives his right to a single trial. *Id.*

The transcript of the plea hearing clearly indicates that defendant knew that the prosecution was going to proceed with its motion for rehearing on the possession with intent to deliver charges, the charges in the case at bar. Defense counsel specifically explained to the court that this case was pending and specifically asked defendant if he understood that the plea agreement had nothing to do with those charges. Defendant may not assign error on appeal to something that his own counsel deemed proper. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995). Thus, we find that the trial court erred by dismissing the charges in the case at bar.

On cross appeal, defendant argues that he was subjected to prosecutorial vindictiveness because the Oakland County prosecutor's office had no jurisdiction in the matter, but pursued the case when it was turned over to that office. We disagree.

Defendant has failed to meet his burden of establishing prosecutorial vindictiveness. *People v Ryan*, 451 Mich 30, 36; 545 NW2d 612 (1996). The record shows that the U. S. Attorney did not have the authority to insist on prosecution or to preclude the prosecutor's office from prosecuting the case. Moreover, it was the special agent who initiated contact with the prosecutor's office, not the U. S. Attorney. Furthermore, Oakland County had jurisdiction and an interest in defendant based on information they had received regarding drug trafficking at an auto plant. Thus, since the Oakland County prosecutor's office had the discretion whether or not to bring charges, there was no prosecutorial vindictiveness.

We reverse the trial court's order dismissing the charges in the case at bar and affirm the trial court's denial of defendant's motion for prosecutorial vindictiveness. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Myron H. Wahls

/s/ Maureen Pulte Reilly

¹ It appears from the record that the trial court incorrectly stated that the crime charged in the case at bar was delivery of a controlled substance, rather than possession with intent to deliver.